

# Developing a Model Grievance Procedure for Addressing Funding Problems: A Case Study of Title I of the Ryan White Comprehensive AIDS Resource Emergency Act

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## I. INTRODUCTION

The Ryan White Comprehensive AIDS Resources Emergency Act (hereinafter Ryan White CARE Act),<sup>1</sup> established in 1990,<sup>2</sup> exists<sup>3</sup> to give federal assistance to various entities<sup>4</sup> that render services to persons affected by HIV and AIDS. Title I<sup>5</sup> of the Ryan White CARE Act provides emergency relief to certain metropolitan areas where HIV and AIDS are most heavily concentrated and which demonstrate a substantial need for services. Title II distributes funds through care grants to states while placing a special emphasis on the needs of smaller cities and rural areas.<sup>6</sup> Title III implements early intervention services.<sup>7</sup> Title IV ensures that youth, women and families obtain HIV and AIDS services and have access

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<sup>1</sup> See generally Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1990) (codified as amended in scattered sections of 42 U.S.C.); see also generally Ryan White CARE Act Amendments of 1996, Pub. L. No. 104-146, 110 Stat. 1346 (1996) (codified as amended in scattered sections of 42 U.S.C.).

<sup>2</sup> The Ryan White CARE Act is named after a teenager who contracted the HIV virus, became a public educator on HIV and AIDS and died the same year the Act was passed. See S. REP. NO. 104-25, at 4 (1995). For more information on the Ryan White story, see RYAN WHITE & ANN MARIE CUNNINGHAM, RYAN WHITE, MY OWN STORY (1991).

<sup>3</sup> The Ryan White CARE Act was amended and reauthorized on May 20, 1996, by Pub. L. No. 104-146, 110 Stat. 1346 (1996) (codified as amended in scattered sections of 42 U.S.C.).

<sup>4</sup> These entities include cities, states and public clinics. See H.R. REP. NO. 104-245, at 9 (1995).

<sup>5</sup> Title I is called the "HIV Emergency Relief Grant Program." See 42 U.S.C. § 300ff-11 (1996).

<sup>6</sup> Title II is called "HIV Care Grants." See *id.* § 300ff-21.

<sup>7</sup> Title III is called "Early Intervention Services." See *id.* § 300ff-41.

to research.<sup>8</sup> Part F<sup>9</sup> invokes several programs designed for specific needs.<sup>10</sup> Each of these provisions of the statute are a necessary part to the fight against HIV and AIDS.

Title I of the Ryan White CARE Act allocates funding to health care providers in certain eligible metropolitan areas. Two types of funds are awarded: formula grants<sup>11</sup> and supplemental grants.<sup>12</sup> Once a metropolitan area meets certain specified criteria,<sup>13</sup> it is eligible to receive both types of grants. The HIV Health Services Planning Council<sup>14</sup> determines, by means

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<sup>8</sup> Title IV is called "General Provisions, Reports and Evaluations." *See id.* § 300ff-71.

<sup>9</sup> This section is labeled "Part F-Demonstration and Training." *See* 42 U.S.C. § 300ff-101.

<sup>10</sup> For example, Part F establishes the Special Projects of National Significance Program, the HIV/AIDS Dental Reimbursement Program and AIDS Education and Training Centers. *See id.*

<sup>11</sup> Formula grants are used for two main purposes. First, persons with HIV or AIDS and their families obtain community-based outpatient health and support services, including comprehensive medical care, home care and transportation. Second, HIV and AIDS patients are provided with in-patient case management to prevent unnecessary hospital expenses or to expedite hospital discharge. *See* Health and Services Administration, Rockville, Md., Title I: Ryan White CARE Act, HRSA Fact Sheet 1 (Jan. 1997) (on file with author).

<sup>12</sup> Supplemental grants are given later in the fiscal year to metropolitan areas that show an extreme need for additional assistance. In the Amendments of 1996, a priority for these supplementary grants for the distribution of funds related to "co-morbid conditions" was established due to the effect that severe illness has on the delivery of services. Examples of these "co-morbid conditions" include sexually transmitted diseases, tuberculosis, severe mental illness, homelessness and substance abuse. *See* S. REP. NO. 104-25, at 5 (1995).

<sup>13</sup> The criteria for eligibility to obtain funding has changed. Under the Amendments of 1996, a metropolitan area must have 2000 cases of AIDS in the most recent five calendar years and must have a population of 500,000 or more. However, in 1990, a metropolitan area was eligible to receive grants if it had reported 2000 cases of AIDS no matter when the cases were reported and the per capita incidence of cumulative cases of AIDS was not less than .0025. The criteria changed in order to respond better to those areas desperately in need of monetary assistance. *See* 42 U.S.C. § 300ff-11 (1996).

<sup>14</sup> Duties of the planning council include establishing priorities for the allocation of funds within an eligible area, developing a plan consistent with state and local guidelines to provide for health services to individuals with HIV and determining the efficiency in the allocation of funds to areas of greatest need. *See id.* The planning

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council composition continues to be a major determinant of allocation of available federal funds. This council should represent people living with HIV/AIDS, consumers of Ryan White services and the affected communities.

[T]he steady expansion and changed demographics of the epidemic and the increasing survival rates for people living with AIDS has in some areas increased the stress on local health care systems. This strain is felt in both urban centers where the epidemic continues to rage, and in smaller cities and rural areas, where the epidemic is expanding rapidly.

S. REP. NO. 104-25, at 5 (1995). As a result, representation of these planning councils was altered to reflect more accurately the demographics of the HIV epidemic, the appropriate communities, the subpopulations and the providers. *See id.* at 3. The Ryan White CARE Amendments of 1996 stipulate the following:

- [t]he HIV health services planning council shall include representatives of
- (A) health care providers, including federally qualified health centers;
  - (B) community-based organizations serving affected populations and AIDS service organizations;
  - (C) social service providers;
  - (D) mental health and substance abuse providers;
  - (E) local public health agencies;
  - (F) hospital planning agencies or health care planning agencies;
  - (G) affected communities, including people with HIV disease or AIDS and historically underserved groups and subpopulations;
  - (H) nonelected community leaders;
  - (I) State government (including the State medicaid agency and the agency administering the program under part B);
  - (J) grantees under subpart II of part C;
  - (K) grantees under section 2671, or, if none are operating in the area, representatives of organizations with a history of serving children, youth, women, and families living with HIV and operating in the area; and
  - (L) grantees under other Federal HIV programs[.]

42 U.S.C. § 300ff-12 (1996).

Selection of the planning council members is made by nominations through an open process, and candidates are chosen based on locally identified and publicized criteria that include a conflict of interest standard. *See id.* This conflict of interest standard provides that an individual serving on the planning council must agree that if that "individual has a financial interest in an entity, if the individual is an employee of a public or private entity, or if the individual is a member of a public or private organization, and such entity or organization is seeking amounts from a grant," the individual will not participate in the process of selecting the entities to receive such amounts for funding. *Id.* For a clear understanding of the relationship between the planning council members and the amount of funds awarded to a specific area, see generally E.P. Goosby et al., *Health Resources and Service Administration, The Relationship Between Ryan White HIV Planning Council Representation and Allocation of Funding in Twenty-Five High Incident Urban Settings* (1993) (on file with author).

of a formula, the amount of funds to which each metropolitan area is entitled and distributes those funds accordingly to the grantee, which is the city or county that provides the largest proportion of HIV/AIDS services in the metropolitan area. In turn, each grantee allocates funds to local service providers. Thus, there is a two-tiered approach: the planning council appropriates funds to grantees and the grantees designate those funds to local service providers.

As can be expected, because available funds are limited,<sup>15</sup> disputes can arise regarding the amount of funding awarded to organizations<sup>16</sup> and individuals<sup>17</sup> by either the planning council or the local grantee. As a result, Congress imposed a requirement that each locality develop a two-tiered technique designated as a grievance procedure to be used in resolving disputes relating to funding allotment under Title I of the Ryan White CARE Act. In order to assist each locality in developing this technique, Congress also mandated that the Secretary of Health and Human Services design a federal grievance procedure as a model. However, much uncertainty remains as to what type of grievance procedure each locality should adopt. Part II of this Note explains the features of the required model grievance procedure. Part III describes the requirements that the model grievance procedure poses on each locality and the factors that should be considered by the localities in designing their own grievance procedures. In Part IV, the labor-management grievance procedures and the local funding grievance procedures under the Ryan White CARE Act are compared.<sup>18</sup> Part V explores the features that should be adopted by

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<sup>15</sup> As provided by statute, "a State may not use more than 10 percent of amounts received under a grant awarded . . . for administration." 42 U.S.C. § 300ff-28 (1996).

<sup>16</sup> The types of organizations considered by the Conference Committee are outpatient clinics; community-based organizations that have, in the past, served AIDS-infected communities; other organizations that meet the criteria provided by the statute and national, city and county health departments; and national health organizations. These criteria include, for example, cost effectiveness and priority of the affected community. *See* H.R. CONF. REP. NO. 104-545, at 34 (1996).

<sup>17</sup> Examples of individuals who may bring a grievance relating to funding decisions are persons who are HIV infected; parents, friends, spouses and relatives of persons who are HIV infected; public health officials, non-elected leaders and physicians. *See* Kay Eilbert & Rebecca Hines, U.S. Dept. of Health and Human Services, *Evaluation of Local HIV Service Delivery: Issues, Approaches & Strategies Under Title I, The Ryan White CARE Act 3-4* (1996) (on file with author).

each locality to ensure that an exemplary and effective model grievance procedure is constructed.

## II. LANGUAGE OF THE STATUTE

The Ryan White CARE Act Amendments of 1996 mandate that the Secretary develop a model grievance procedure.<sup>19</sup> Using this model as a guide, the local planning council and the local grantees must establish and implement their own grievance procedures.<sup>20</sup> After each locality has considered its own grievance procedure, the Secretary must review the procedure established by both the planning council and the local grantee to ensure that the procedure "permit[s] legitimate grievances to be filed, evaluated, and resolved at the local level."<sup>21</sup> Interestingly, a grantee cannot obtain the funds until the Secretary determines that the grievance procedure developed by either the planning council or grantee complies with the requirements of the model grievance procedure.<sup>22</sup> Once the local grievance procedures are approved by the Secretary, they can be implemented and

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<sup>18</sup> Furthermore, using the labor-management grievance procedure as a guide, the stages that the local grievance procedures should follow are identified and explained.

<sup>19</sup> The Secretary must consult with grantees and public and private experts when developing a model procedure. *See id.* This model procedure should describe the principles and set guidelines that the planning council and local grantees must adhere to when developing their own grievance procedure. *See id.*

<sup>20</sup> The development and implementation of these grievance procedures occur at the local level with the federal government providing technical assistance in building a model and reviewing the local procedures. However, this grievance process was a compromise based on a Senate bill that suggested federal arbitration of local disputes and a House bill that contained no language on grievances. *See S. REP. NO. 104-25*, at 19 (1995); *see also H.R. CONF. REP. NO. 104-545*, at 34 (1995); Department of Human Services, Reauthorization Issue Paper: Grievance Procedures 3-4 (on file with author).

<sup>21</sup> 42 U.S.C. § 300ff-12 (1996).

<sup>22</sup> *See id.* In fact, the City of Philadelphia's grievance procedures stated that "[a]dherence to the procedures and time frames stated herein is mandatory for grievances to remain eligible for redress and consideration." Philadelphia Department of Public Health, Grievance Procedures: Title I of the Ryan White CARE Act Amendments of 1996 1 (June 1, 1997) (on file with author).

reviewed, if needed, by the Health Resources and Services Administration.<sup>23</sup>

### III. THE MODEL GRIEVANCE PROCEDURE FOR LOCAL PLANNING COUNCILS AND LOCAL GRANTEEES UNDER TITLE I OF THE RYAN WHITE CARE ACT

The model grievance procedure established by the Secretary stipulates the basic elements that the planning councils and grantees need to include in their local grievance procedures. The local grievance procedures must state what type of grievances can be brought, which parties have standing, the nonbinding procedures that should be used when resolving conflicts, the steps that must occur during the binding arbitration process and the rules to be followed during the entire grievance process. Each of these elements will be explored below.

First, the local grievance procedures, at the minimum, must cover certain types of grievances.<sup>24</sup> Local grievance procedures designed by either the planning council or grantee can cover additional types of grievances at local discretion.<sup>25</sup> For planning councils, grievance

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<sup>23</sup> This review procedure by the Health Resources and Services Administration (HRSA) may be an additional requirement. The grievance procedures established by the planning council and grantees may have to be accepted as adequate by the Health Resources and Services Administration. See Department of Human Services, *supra* note 20, at 3.

<sup>24</sup> For example, the City of Philadelphia's Grievance Procedures stipulate that grievances are limited to allegations of failure to follow stated processes for decision making for Title I contract awards. See Philadelphia Department of Public Health, *supra* note 22, at 1. Specifically, the procedure states that providers and consumer groups, coalitions or caucus grievants can only bring a grievance for "alleged deviations from the Department's established contracting and awards process," such as selecting a provider in an improper way, and for "alleged deviations from the established process for any subsequent changes to the selection of contractors or awards." *Id.* at 6-7. Additionally, the procedure provides that the local planning council, which is designated as the HIV Commission in Philadelphia, can grieve for inconsistencies with the priorities and allocations made by the HIV Commission, it can grieve for and contract and award changes that are not consistent with the priorities and resource allocations made by the Commission. See *id.* at 7.

<sup>25</sup> For planning councils, the local grievance procedures should also cover problems regarding delays in dispersing funds, false information entered into the allocation formula and the failure of a nonrecipient service provider to provide health

procedures must address problems with the way the planning council establishes priorities for obtaining funds and allocates those funds to comply with those priorities. The grievance procedures must also explain how to resolve conflicts between parties when the planning council subsequently amends those priorities or allocations.<sup>26</sup> With respect to grantees, their local grievance procedures must describe the procedure for selecting and allocating funds to service providers.<sup>27</sup> The methods of resolution to be used by each local grievance procedure must be included in order for the Secretary to approve the grievance procedure.

Second, the local grievance procedures must indicate which parties have standing to bring a grievance. Local grievance procedures must enable any directly affected party to bring a grievance. Those directly affected parties, as defined by the model procedure, can include providers eligible to receive Ryan White funding, entities and individuals who may be affected as determined locally<sup>28</sup> and consumer groups and coalitions.<sup>29</sup> Additionally, the local grievance procedures set by the grantees must allow planning councils to bring a grievance against the grantee for not properly allocating the resources according to the priorities set by the planning council.

The model also requires that the local grievance procedures describe the nonbinding method required to resolve conflicts. The local grievance procedures must include the four main parts of this procedure: the name of the entity to receive the grievance, a form to initiate nonbinding dispute resolution,<sup>30</sup> the rules of the nonbinding dispute resolution process and a

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care services to HIV/AIDS patients thereby increasing the workload of other service providers in the metropolitan area. For grantees, the local grievance procedures should also address disputes regarding the lack of quality care to persons other than grantees, delays in dispersing funds and fraud and concealment efforts.

<sup>26</sup> See HRSA, Division of Human Services, Model Grievance Procedures for Planning Councils and Grantees Under Title I of the Ryan White CARE Act 1 (on file with author) [hereinafter HRSA Procedures].

<sup>27</sup> See *id.*

<sup>28</sup> This includes people who have HIV or AIDS.

<sup>29</sup> These entities, listed as directly affected parties, are all that are required by the model grievance procedure to be addressed locally. These entities and individuals should include, at least, those organizations and individuals as discussed above. See *supra* notes 16–17 and accompanying text.

<sup>30</sup> The minimum requirements that must be entered on the form are as follows: the names, addresses and telephone numbers of the parties involved; the problem(s) needing resolution and how the planning council or grantee, whichever is relevant, has directly

method to inform the grievant of these rules and the steps the grievant may take if the grievance is not resolved by nonbinding dispute resolution.<sup>31</sup> Only by addressing these four parts of the nonbinding procedure can a local grievance procedure comply with the federal model.

The fourth requirement of the local grievance procedures is an explanation of the binding arbitration procedure, which is similar to the nonbinding procedure.<sup>32</sup> Finally, the model requires that the local grievance procedures list the general rules for the entire grievance process. Several rules must be included. First, the grievance procedure must state any applicable time periods.<sup>33</sup> Second, the grievance procedure must set out the costs of administering the procedure.<sup>34</sup> Third, it must address the

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affected the grievant; the grievant's expected remedy; the location or person to whom the form should be sent; the chosen party that will notify the grievant of any updates on the grievance process; and the administrative fee paid by the grievant. *See* HRSA Procedures, *supra* note 26, at 3. The local grievance procedures should also contain a reference to the provisions of the Ryan White CARE Act that support the grievant's claim (i.e., the funding allocation formula provisions). *See* JOHN P. SANDERSON & JERRY W. BROWN, *LABOUR ARBITRATIONS AND ALL THAT: A HANDBOOK ON THE PREPARATION AND PRESENTATION OF LABOUR ARBITRATIONS* 8 (3d ed. 1994).

<sup>31</sup> If the grievance is not resolved within the appropriate time period, the grievant can initiate binding arbitration. However, this is the only other remedy that the grievant can pursue.

<sup>32</sup> The parts that are required in the local grievance procedure regarding binding arbitration include the name of the entity to receive a request for binding arbitration, a form to initiate binding arbitration, rules applicable during the binding arbitration process and a method of informing the grievant of the applicable rules of the arbitration. *See* HRSA Procedures, *supra* note 26, at 4.

<sup>33</sup> At a minimum the following time periods must be specified:

1. the amount of time a grievant has to bring a grievance after a funding decision is made;
2. time periods for the conduct of nonbinding dispute resolution procedures;
3. a limit on the time a nonbinding process can be unresolved;
4. a limit on the time of the arbitration process; and
5. the amount of time a grievant has to initiate binding arbitration after the nonbinding dispute resolution process terminates.

*See id.* at 5.

<sup>34</sup> The procedure should at least include a list of costs that will probably be incurred, the party responsible for these costs, the date these costs are due and the costs



issue of whether settlements, if reached, should be prospective or retroactive. Fourth, the process of determining which parties have standing must be specified in the grievance procedure. Fifth, the grievance procedure must explain the methods by which third parties will be selected for dispute settlement processes.<sup>35</sup> Sixth, regarding nonbinding procedures, the grievance procedure must include rules concerning the amount of

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or transfers of money that may be required by the parties in the nonbinding process or arbitration. *See id.*

<sup>35</sup> In a public policy dispute resolution process, there are at least four issues regarding the selection of the third-party intervenor. First, considering that the majority of public disputes are highly complex, it is questionable whether one set of standards that will work in all the disputes can be used in order to choose the third-party intervenor. *See* Lisa Schirch-Elias, *Public Dispute Intervenor Standards and Qualifications*, in *QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE* 79-80 (Catherine Morris & Andrew Pirie eds., 1994). Perhaps, the local grievance procedure should state that standards stipulated by the grievant, as long as they are fair, can be used to determine the third party. Furthermore, because settlements reached in public disputes may set precedent for future disputes or for the long-term costs of the solution to other groups, the third-party intervenor who is chosen must be knowledgeable about the field and the issue at hand. *See id.* at 81. Thus, an intervenor who is fair may be one who is willing to consider the effects of his or her decision on future grievants. This suggests that the local grievance procedures should allow a grievant to take some part in choosing the third party intervenor, but also suggests that the third party should be skilled and trained in the area of AIDS funding as well as knowledgeable about the local affected parties so that she will know the effects that her decision will have in the surrounding area.

Second, public disputes should be focused on conflict resolution rather than dispute settlement. *See id.* at 82. Conflict resolution involves analyzing the larger context and complexity of each dispute. *See id.* The third party should consider the complexity of the larger concerns in the process. *See id.* This is another reason why the local grievance procedures should stipulate that any third party involved be educated in the area of AIDS funding and other related issues and be focused on the issues that may help to resolve the conflict in the long-term. *See id.*

Third, it may not be necessary to make certain that the third party is neutral. Instead, local grievance procedures should require "impartial" (meaning concerned for the public good) rather than neutral intervenors. *See* Schirch-Elias, *supra*, at 83-84.

Fourth, the local grievance procedures should mandate that the intervenors have some knowledge of the technical issues involved and have "content expertise." *See id.* at 85; *see also* Gerald W. Cormick, *Where, When and How to Use Mediated Negotiations: A Checklist for the Potential Participant*, CANADIAN ENVIRONMENTAL MEDIATION NEWSLETTER 1988, at 8. Additionally, the intervenor should have some process expertise.

In all of these ways, the local grievance procedures will enable the procedure to be effective and fair.

confidentiality, the place where the parties will meet, the time periods concerning those party meetings, the method of choosing a third party, the allowed response time after a grievance is filed and the length of time after which the third party can terminate the nonbinding procedure.<sup>36</sup> Finally, the procedure must state the arbitration rules concerning the place of the hearing, the time periods for a response after the initiation of arbitration, the time periods for holding a hearing and the time periods in which the arbitrator must render a decision.<sup>37</sup> All of these rules must be included in the local grievance procedure to fulfill the statutory requirement.

#### IV. A DESIGN TOOL: THE GRIEVANCE PROCESS IN LABOR RELATIONS

##### *A. The Labor-Management Grievance Procedure Provides Effective Guidelines for the Design and Implementation of Local Ryan White CARE Act Grievance Procedures*

Because labor-management grievance procedures are well established and critiqued,<sup>38</sup> they can serve as guidelines toward designing these local grievance procedures. The overall role of the labor grievance procedure is "to process such allegations through a succession of steps from lower to higher."<sup>39</sup> The labor-management grievance procedures function in three ways: they enable parties to resolve disagreements regarding the interpretation and meaning of contracts, they establish a procedure for settling complaints between parties and they permit adjudication of disputes particular to local conditions.<sup>40</sup> The local grievance procedures under the Ryan White CARE Act function similarly in several ways. First, the local grievance procedures will enable "directly affected"<sup>41</sup> parties to resolve

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<sup>36</sup> For an example of such rules, see Philadelphia Department of Public Health, *supra* note 22, at 10-11.

<sup>37</sup> *See id.* at 12-13.

<sup>38</sup> *See* INT'L LABOUR OFFICE, GRIEVANCE ARBITRATION: A PRACTICAL GUIDE 4 (1977).

<sup>39</sup> MICHAEL J. DUANE, THE GRIEVANCE PROCESS IN LABOR-MANAGEMENT COOPERATION 64 (1993).

<sup>40</sup> *See id.*

<sup>41</sup> For a definition of "directly affected" parties, see *supra* notes 16-17 and accompanying text.

disputes regarding the amount of funding they obtain due to the interpretation and meaning of the funding formula. Second, these procedures will establish a method for settling disputes. Third, because these procedures are established locally, they allow for the resolution of disputes particular to the local area. Because these local grievance procedures function similarly to labor-management grievance procedures, various principles from labor-management procedures can be used in designing effective local grievance procedures under Title I of the Ryan White CARE Act.

Other aspects of these local grievance procedures also resemble those of the labor-management procedures. The objective of the labor-management grievance procedures, which is to bring complaints to the surface and to settle them peacefully, is also the objective of these local grievance procedures. The main justifications for both the labor and local grievance procedures are the same: fairness and justice.<sup>42</sup> The purpose of labor grievance procedures is to provide workers with a fair and impartial method to resolve their grievances.<sup>43</sup> The local grievance procedures for the Ryan White CARE Act are based on a similar notion.<sup>44</sup> Another similarity between the labor and local grievance procedures is the importance of a prompt<sup>45</sup> resolution technique. Furthermore, binding arbitration is frequently the last stage in both types of procedures. Because there is such a similarity between the purposes and goals of the labor-management grievance procedures and the local grievance procedures, the labor-management grievance procedures can provide some insight and specific direction to the methodology and functionality of the local grievance procedures under Title I of the Ryan White CARE Act.

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<sup>42</sup> See INT'L LABOUR OFFICE, *supra* note 38, at 5; see also *infra* notes 92-95 and accompanying text.

<sup>43</sup> See INT'L LABOUR OFFICE, *supra* note 38, at 5.

<sup>44</sup> See *infra* notes 92-95 and accompanying text.

<sup>45</sup> See LOUIS J. VAN MOL, *EFFECTIVE PROCEDURES FOR THE HANDLING OF EMPLOYEE GRIEVANCES* 2 (1966).

*B. Setting Stages in the Local Grievance Procedures as Modeled by the Labor-Management Grievance Procedures*

Typically, labor-management grievance procedures involve four stages.<sup>46</sup> Because the local grievance procedures are so similar to these labor-management grievance procedures, the local grievance procedures should likewise contain these four stages with specific time limitations.<sup>47</sup> The first stage of the local grievance procedures should be confrontation<sup>48</sup> and the filing of a written complaint.<sup>49</sup> The goal of this stage is to resolve

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<sup>46</sup> See DUANE, *supra* note 39, at 65; see generally VAN MOL, *supra* note 45.

<sup>47</sup> All time limits herein stated are exclusive of Saturdays, Sundays and holidays. See NORMAN METZGER & JOSEPH M. FERENTINO, *THE ARBITRATION AND GRIEVANCE PROCESS: A GUIDE FOR HEALTH CARE SUPERVISORS* 30 (1994); see also Philadelphia Department of Public Health, *supra* note 22, at 5-6. The City of Philadelphia's grievance procedures provide for only three stages. The first stage is titled "Review of the Funding Decision Process." *Id.* at 5. During this stage the grievant files a Request for Review of the Funding Decision Process to the Department. This document includes a written declaration of the alleged wrongdoing by the locality. The Department performs an internal review of the grievance and issues a report concerning the recommended resolution to the grievance. The maximum number of business days that a grievant has to file a grievance is 30 business days from the time the cause of action accrues (the point at which the Department posts the HIV Services Procurement Announcement) and the end of stage one. See *id.* at 5. The second stage is "Mediation." See *id.* The grievant can proceed to this stage if unsatisfied with the resolution in stage one. The grievant must file a Notice of Mediation and pay the filing fee. The Department will choose the mediator annually. The mediator's role is "to facilitate a process in which the Department and the grievant reach a mutually acceptable agreement on a resolution to the grievance." *Id.* at 6. The maximum number of days from the date a grievant files a mediation request to the end of stage two is 30 business days. See *id.* The final stage is arbitration. The grievant files a Request for Arbitration and pays a filing fee. The Department also chooses an arbitrator, who renders a binding resolution after reviewing the grievance. The maximum number of days from the date a grievant files an arbitration request to the end of stage three is 30 business days. See *id.*

<sup>48</sup> See DUANE, *supra* note 39, at 64. The dissatisfied employee discusses the problem with the direct supervisor. See *id.*

<sup>49</sup> See *id.* If the dispute is not settled by the discussion between the employee and the supervisor, the employee submits the dispute in writing to management. Management issues a decision within a specified time period and the employee is entitled to appeal its decision. "Putting the grievance in writing at the first stage can sometimes prevent misunderstandings between the parties, because the requirement to

the problem informally within a short period of time.<sup>50</sup> The local grievance procedures should allow up to thirty days after a funding decision for an entity to decide whether to challenge the allocation decision.<sup>51</sup> The state agency responsible for HIV services in each locality should appoint a specific person to be the "confrontant,"<sup>52</sup> whose duties would include speaking with grievants.<sup>53</sup> When a grievant has any complaints regarding funding allocations under Title I of the Ryan White CARE Act, that grievant must first speak to the confrontant regarding the grievant's complaint.<sup>54</sup> The confrontant must then investigate the grievant's complaint so that an appropriate response can be made to the grievant.<sup>55</sup> This

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find the right words helps to focus the mind on the nature of the issue." See SANDERSON & BROWN, *supra* note 30, at 10.

<sup>50</sup> See DUANE, *supra* note 39, at 64-65 (1993).

<sup>51</sup> See HRSA, Division of HIV Services, Annotations to the Model Grievance Procedures for Planning Councils and Grantees Under Title I of the Ryan White CARE Act 8 (on file with author) [hereinafter HRSA Annotations]. This 30-day time limit is generous. In a management-labor grievance procedure, the time limit to bring a grievance is 10 days after the injurious event occurred. See Collective Bargaining Agreement Between The Ohio State University and Communications Workers of America Local 4501 (Apr. 1, 1994-Mar. 31, 1997) (on file with author).

<sup>52</sup> It is important that this confrontant be trained and experienced with the funding allocation formula and grievance processing. Inexperienced grievance officials will generally file more grievances, many of which are without merit. See DUANE, *supra* note 39, at 92. By increasing the knowledge and experience of the confrontant, who is the grievance official in this case, more grievances will be quickly resolved and fewer grievances will proceed to later stages in the grievance process. As a result, costs will be reduced. Additionally, teaching and training the people who handle grievance procedures and render decisions will enhance the effectiveness of the grievance procedure. See SANDERSON & BROWN, *supra* note 30, at 10. Through this training, these people learn how to perform their roles responsibly. See *id.* Additionally, it is important that the confrontant be available, have power and be neutral. See JAMES C. MCBREARTY & GUY M. PARENT, GRIEVANCES FROM PREVENTION THROUGH ARBITRATION 9 (1973).

<sup>53</sup> It has been suggested that grievance handling be the confrontant's only responsibility and duty. See *id.*

<sup>54</sup> See SANDERSON & BROWN, *supra* note 30, at 12. Allowing grievants to speak over the telephone to the confrontant may serve as a safety precaution by enabling grievants to air their complaints, which sometimes proves valuable for all parties in interest. See *id.*

<sup>55</sup> This procedure is similar to one used for non-union grievances. See *id.* at 71.

investigation should be completed within five days.<sup>56</sup> In effect, the confrontant is acting as a "troubleshooter."<sup>57</sup> If the grievant is not satisfied with the confrontant's response, then the grievant can file a written complaint<sup>58</sup> with the locality.<sup>59</sup> By including these phases in the first stage of each local grievance procedure, the goals of resolving the disputes informally and quickly will be furthered.<sup>60</sup>

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<sup>56</sup> Within these five days, the confrontant must determine whether the grievance falls within the scope of procedures, notify the other party, investigate the grievance and render an opinion. This opinion advises the grievant whether or not to file a written complaint. See HRSA Annotations, *supra* note 51, at 8. The purpose of this step is to "provide a broader consideration of a filing of a grievance procedure as called for in the reauthorization of the CARE Act." *Id.* at 9. This five-day time frame is not unreasonable. First of all, the model grievance procedure requires that these stages be completed within three to seven days. See *id.* at 8. Additionally, this time period is not unreasonable because there is little dissemination of information. The confrontant is trained and experienced with the funding allocation formula and grievance process and has much of the necessary funding information. Because the information required to make an informed decision is concentrated, it is fairly simple for the confrontant to render a prompt decision.

<sup>57</sup> In labor-management grievance procedures, the use of a troubleshooter is beneficial. See SANDERSON & BROWN, *supra* note 30, at 28.

A troubleshooter can move quickly to deal with grievance hot spots and inject into the process notes of both urgency and flexibility. This is usually accomplished by selecting a person or persons who have the capacity, experience and sensitivity to the needs of the parties, to perform this role, and by designing a precise series of steps to be followed, together with a code of conduct for all participants. While there are a number of variations, there are commonly some central or core issues in each individual process . . . . Generally, the troubleshooter will have investigatory power, that is, the capacity to conduct interviews and to proceed . . . to inquire into the specific facts and circumstances.

*Id.* at 28-29.

<sup>58</sup> This complaint should include the "well-known 'W's' of documenting facts relevant to a grievance: WHO did WHAT to WHOM, WHEN, WHERE, HOW; WHY the grievance exists and WHAT redress is sought." MCBREARTY & PARENT, *supra* note 52, at 3.

<sup>59</sup> Although this first stage may not settle the problem, it may help to identify the issues. See SANDERSON & BROWN, *supra* note 30, at 8.

<sup>60</sup> These goals will be furthered to the extent that the confrontant is able to resolve the grievant's dispute through their confrontation. If the confrontant is more knowledgeable about funding decisions, the number of disputes being resolved through this confrontation channel will be reduced. Therefore, it is vital that the confrontant is

The second stage of the local grievance procedure should involve written decisions from the dispute review board.<sup>61</sup> Such a review board should be made up of neutral industry experts<sup>62</sup> selected by the planning council, the grantee and affected parties. The dispute review board must be extremely familiar with the funding formula and the grievance procedure precedent. This board must render a decision within five days of the complaint being filed.<sup>63</sup> If the grievant is not satisfied with the written decision<sup>64</sup> of the board, the grievant can appeal the decision within three days.<sup>65</sup> These written decisions by the dispute review board can be used as evidence for the third step in the grievance process.<sup>66</sup>

As in the labor-management grievance process,<sup>67</sup> grievances that are appealed to stage three involve important issues.<sup>68</sup> Because this stage

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trained regarding possible grievance issues with respect to funding and the effective ways to resolve informal disputes.

<sup>61</sup> For a discussion on how the use of a dispute review board affects the timeliness of the grievance process, see *infra* notes 88–90 and accompanying text.

<sup>62</sup> In order to provide high-speed resolution of disputes, the construction industry has a review board. Members on this board include neutral industry experts who are selected at the beginning of a construction project by the owner and the contractor. See *infra* notes 88–90 and accompanying text.

<sup>63</sup> This five day time limit is reasonable. In a labor-management procedure, “[w]ithin five (5) working days after the first level meeting, the supervisor will answer the grievance in writing on the grievance form.” Collective Bargaining Agreement Between The Ohio State University and Communications Workers of America Local 4501, *supra* note 51, at 10.

<sup>64</sup> If the decision is not in favor of the grievant, it should be more than a simple denial. In fact, the decision should include an explanation, at least in principle, for the locality’s refusal to grant funding to the grievant. See SANDERSON & BROWN, *supra* note 30, at 13. Written records are extremely important because they serve the purposes of effective review and feedback. See METZGER & FERENTINO, *supra* note 47, at 24.

<sup>65</sup> However, any disposition of a grievance in which no appeal is taken within the specified time limits shall be resolved and shall not be considered subject to the grievance and arbitration process of the local grievance procedure. See METZGER & FERENTINO, *supra* note 47, at 29.

<sup>66</sup> See *id.*

<sup>67</sup> See *supra* notes 35–42 and accompanying text.

<sup>68</sup> See DUANE, *supra* note 39, at 66. These issues range from those having precedent-setting ramifications to high cost implications or broad implications in the funding process. See *id.*

involves important issues, high level government officials<sup>69</sup> must render the decision quickly but effectively.<sup>70</sup> Therefore, the local grievance procedures should allow a maximum of twenty days for the completion of this stage.<sup>71</sup> In their decision, these government officials should thoroughly explain the reasons the decision was made and include several specific and explanatory provisions so that these decisions can be used later as precedents.<sup>72</sup> These specific provisions should include the following: the

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<sup>69</sup> These government officials, who determine national funding needs, should be those persons who are extremely informed about the locality's funding decisions. Each locality may provide for various persons to participate in this stage. However, it is crucial that local and national figures play a part in resolving these grievances because decisions made in this stage of the process could possibly affect all localities. Examples of some of these national persons are the Deputy Director of the Division of HIV Services; the Director of Division of HIV Services; the Director of the Division of Planning and Evaluation in the Office of Planning, Evaluation, and Legislation; the Project Officers of the Division of HIV Services; Public Health Analyst and the Chief of the Division of HIV Services. Similarly, the City of Philadelphia's grievance procedures require that the Department provide "an explanation of its rationale for the decision in an effort to resolve a disagreement at as early and informal a stage as possible." Philadelphia Department of Public Health, *supra* note 22, at 4. This is part of the City's attempt to prevent disputes.

<sup>70</sup> All the consequences of the decision, especially in other grievances containing presidential and other important issues, must be considered. "It is essential to know the effect the settlement will have, not only on the individual but on the group." METZGER & FERENTINO, *supra* note 47, at 26.

<sup>71</sup> Within these 20 days, the presiding government officials must be selected, the parties must meet and the decision must be made and composed. See HRSA Annotations, *supra* note 51, at 8. This time period is not unreasonable. See *id.* A local labor-management grievance procedure allows only 10 days for this process. See Collective Bargaining Agreement Between The Ohio State University and Communications Workers of America Local 4501, *supra* note 51, at 10.

<sup>72</sup> See DUANE, *supra* note 39, at 67. This written decision should discuss in detail the reasons for the refusal to grant funding to the grievant so that similar grievances can be resolved by looking at these past decisions for guidance. See SANDERSON & BROWN, *supra* note 30, at 13. However, the past decisions shall not be binding on all future cases. They will merely provide guidance for future grievances. See MCBREARTY & PARENT, *supra* note 52, at 17. In a case regarding the denial of health care service from HMOs, the court held that any decision that is unfavorable to the grievant must set forth a statement of the case, including a discussion of the evidence as well as the reasons upon which the decision is based. See *Grijalva v. Shalala*, 946 F. Supp. 747, 750 (D. Ariz. 1996).



names of the parties to the grievance, the facts regarding the grievance,<sup>73</sup> the issues involved,<sup>74</sup> each party's position, the relevant provisions of the Ryan White CARE Act, the discussion and reasoning of the decision and the award. By involving government officials in this stage, purposes besides expediency are served.<sup>75</sup>

If the grievant is still not satisfied with the decision rendered by the government officials, the grievant can choose to resolve his or her grievance through binding arbitration.<sup>76</sup> The grievant has five days to choose to move forward to this next stage. At this point, the maximum number of days that have passed since the first stage is thirty-seven. The final stage involving arbitration is a quasi-trial in which a neutral third party hears evidence from both sides and renders a decision that is final and binding on both parties.<sup>77</sup> This stage should last no more than thirty-eight

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<sup>73</sup> It is important that the grievance is formulated correctly, and that the events leading up to the dispute are clear. *See* INT'L LABOUR OFFICE, *supra* note 38, at 33. This is because "[t]he most important job in the handling of grievances is getting the facts." METZGER & FERENTINO, *supra* note 47, at 24. Therefore, it is vital that the decisionmaker listen attentively, facilitate full discussion and defer judgment. *See id.*

<sup>74</sup> The issue that was determined should be included in the decision so that only the specific issue involved can be the focus of the next stage. It is advantageous if both parties to the grievance process can agree on the issue to be decided. Otherwise, the officials rendering the decision will have discretion to choose the scope of their decision. In any event, it is important that the issue be defined before binding arbitration so that "the parties are at least in agreement over what they disagree about." METZGER & FERENTINO, *supra* note 47, at 24. If the parties can agree to the issue, then the grievance process will function more quickly and efficiently. *See id.*

<sup>75</sup> When these officials meet to render a decision, they are provided with "on-the-job training." DUANE, *supra* note 39, at 66. Thus, the third stage acts as a training mechanism. Additionally, this stage "serves as a therapeutic mechanism for the grievant, who may simply wish to express discontent to upper-level" persons. *Id.* This stage also detects problems and identifies specific types of grievants so that future similar grievances will be prevented. *See id.*

<sup>76</sup> However, it is hoped that many grievances will not reach this stage of binding arbitration. There is a heavy emphasis on the consensual process (stages one through three) of dispute resolution. In fact, the goal is that less than 10% of grievances brought under the Ryan White CARE Act will proceed to this final stage of binding arbitration. *See* Telephone Interview with John Settle, Chief of Division of HIV Services (Jan. 20, 1997).

<sup>77</sup> For a discussion of the various characteristics that an arbitrator should have, see INT'L LABOUR OFFICE, *supra* note 38, at 17 (1977).

days.<sup>78</sup> Clearly, arbitration can be the final outcome of the grievance process.<sup>79</sup>

## V. FEATURES OF THE MODEL GRIEVANCE PROCEDURE THAT THE LOCAL PLANNING COUNCILS AND LOCAL GRANTEEES SHOULD ADOPT

### A. *Goal Oriented*

Quality<sup>80</sup> dispute resolution is required for long-term viability of a design system.<sup>81</sup> In order to obtain quality, the local grievance procedure should fulfill the private or social goals that are being sought. Thus, in order to achieve quality, the goals of the grievance procedure must first be clearly defined. The model grievance procedure has failed to state these specific goals.<sup>82</sup> It is the responsibility of each locality to determine the

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<sup>78</sup> See HRSA Annotations, *supra* note 51, at 8. The City of Philadelphia's grievance procedures mandate that time limits can only be changed by the written agreement of both parties. *See id.*

<sup>79</sup> The City of Philadelphia's grievance procedures state in bold type that "[t]hese procedures are the exclusive remedy for grievances and grievants subject to this policy." Philadelphia Department of Public Health, *supra* note 22, at 2.

<sup>80</sup> See Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENVER U. L. REV. 335 (1989). Quality exists if the procedure furthers the achievement of a valued end. The author believes that the definition of quality remains constant in any dispute resolution technique. *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> The reasons that the model procedure has not clearly defined the goals of the grievance procedures could be attributed to the fact that each local grievance procedure may have different goals. However, the model procedure should at least require that a representative group of affected parties discuss and define the specific goals of the local grievance procedure so that each step of the procedure is geared toward those goals. In a meeting of dispute resolution experts, it was determined that the following goals are to be served by these local grievance procedures: accessibility, efficiency, well-trained neutrals and actual and perceived fairness. *See* Larry Ray, *Ryan White Act and Dispute Resolution*, NAFCM NEWS, Summer 1996, at 8. Other goals that the local grievance procedure should further are to establish certainty in the funding process and to provide the community with a balanced funding formula. Nevertheless, the specific goals that would best suit the locality can be determined by considering factors such as the

specific goals of its grievance procedure.<sup>83</sup> Once the goals of the local grievance procedure are defined, each step of the procedure must be developed to ensure that those goals are being reached.

Section 330ff-13 of the Act does require that the Secretary review the local grievance procedures to make sure they are "adequate."<sup>84</sup> However, this limited review process is not enough. A peer review committee,<sup>85</sup> such as the one suggested by the Senate Report,<sup>86</sup> should be established. This committee should determine the goals of the procedure and investigate whether the local grievance procedure is fulfilling these goals, thereby ensuring that a quality dispute resolution technique has been developed. "Oversight of the implementation should continue to involve representatives of the major users and other concerned interests to maintain support for the system."<sup>87</sup> It is also important that this review committee constantly obtain feedback. "Collective learning and feedback—from a variety of perspectives—about how well the organization is doing in its

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demographics of the people in the locality, the needs of the various hospitals and HIV community organizations, the people that were granted awards in previous years and general HRSA guidelines.

<sup>83</sup> For a list of factors that should be considered when developing goals for local grievance procedures, see *supra* note 78. The City of Philadelphia's Grievance Procedures have specifically identified two goals: to resolve the grievances quickly and to externally assess and resolve grievances by "independent, conflict-of-interest free mediators and arbitrators." Philadelphia Department of Public Health, *supra* note 22, at 1.

<sup>84</sup> See 42 U.S.C. § 300ff-13 (1996). Such local procedures are defined as "adequate" if "such procedures permit legitimate grievances to be filed, evaluated, and resolved at the local level." *Id.* The legislative history suggests that the local grievance procedures are adequate if they contain the key elements that should be addressed in a grievance process. See H.R. CONF. REP. NO. 104-545, at 34 (1996). Adequate, in this context, also means that the local grievance procedures do not narrowly define the parties who have standing to bring a grievance. See Telephone Interview with Jon Nelson, Chief of Division of HIV Services (Feb. 28, 1997).

<sup>85</sup> This committee should be selected by the planning council and grantees with HRSA's guidance and should include parties that are directly affected by Title I. See *supra* notes 16-17 and accompanying text.

<sup>86</sup> See S. REP. NO. 104-25, at 19 (1995).

<sup>87</sup> Jonathan Brock & Gerald W. Cormick, *Can Negotiation Be Institutionalized or Mandated? Lessons from Public Policy and Regulatory Conflicts*, in *MEDIATION RESEARCH* 138, 163 (Kenneth Kressel et al. eds., 1989).

management of conflict as it relates to these interest groups is valued.”<sup>88</sup> Furthermore, to remain goal oriented the review committee should perform other functions such as modifying the procedure, encouraging parties to use the procedure and improving the process in general.<sup>89</sup> The advantage of having such a peer review committee is that the ongoing series of disputes is resolved by an increasingly better procedure than had existed in the past.<sup>90</sup>

Another goal of the local grievance procedures is to expedite funds.<sup>91</sup> One way to provide quick dispute resolution is to use a dispute review board.<sup>92</sup> To facilitate promptness, the local grievance procedures should provide for a dispute review board that resolves the grievance by a non-oral hearing<sup>93</sup> and writes a decision within five days of this hearing. This review board will review the grievance, render a decision and write a summary of its decision. The review board’s decision should thoroughly explain why the grievant was not awarded funding. This decision is, of course, not binding on either party because it is part of the nonbinding section of the grievance procedure. Nevertheless, the local grievance procedures should allow the review board’s decision to be used as evidence in the nonbinding third stage proceeding as explained above.<sup>94</sup> By having

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<sup>88</sup> CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* 57 (1996).

<sup>89</sup> See William Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, in *DISPUTE RESOLUTION AND LAWYERS*, at 49 (2d ed. 1997). Any system could benefit from periodic inspections of the dispute resolution systems. See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> This goal is extremely important when the grievance relates to a denial of medical expenses because a delay in obtaining funding “could financially cripple all but the very wealthy.” *Grijalva v. Shalala*, 946 F. Supp. 747, 756 (D. Ariz. 1996). The denial of medical care cannot be easily remedied by retroactive recoupment of benefits. See *id.* at 757. Medical beneficiaries have a substantial interest in receiving timely care and funds. See *id.*

<sup>92</sup> See STEPHEN B. GOLDBERG ET. AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 77 (2d ed. 1995).

<sup>93</sup> A non-oral hearing is one in which only written documentation and evidence is considered in rendering a decision. A non-oral, or “paper hearing,” provides an adequate opportunity to explain one’s case. See *Grijalva*, 946 F. Supp. at 755 n.30.

<sup>94</sup> It is fair to allow the review board’s decision as evidence in the third stage proceeding for two reasons. First, the review board is made up of neutral individuals that will attempt to be unbiased in the process. Second, the review board will have the

the review board's decision admitted into evidence, the number of grievances that will go to the next phase of binding arbitration will decrease, and consequently, the procedure will be accelerated.<sup>95</sup> The use of a dispute review board, therefore, facilitates the expedition of funds to the grieving party.

On June 17, 1996, another goal of the grievance procedures was proposed. At this time, the National Institute of Health and a group of dispute resolution experts met to discuss potential models. It was determined at this meeting that the grievance procedure should have certain features including actual and perceived fairness.<sup>96</sup> However, the established model grievance procedure failed to adopt such fairness as a required goal for the local grievance procedures. One goal of the local grievance procedures should be fairness because it is an important aspect of any grievance procedure, especially one relating to the public.<sup>97</sup> By not addressing many common problems that are likely to occur relating to funding,<sup>98</sup> the local grievance procedures are neither fair nor perceived to be fair. In order for a resolution system to be effective and fair, the range of issues and the parties to be addressed must be sufficiently defined.<sup>99</sup> Grantees and planning councils should have their local procedures encompass more of the possible grievances that will likely arise so that when such a grievance is filed, all parties involved will have a designated course of action. For example, problems regarding needs assessment, comprehensive planning, the appointment of a planning council and consumer-related issues must be addressed by the local grievance

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information to make an informed decision regarding the funding. The decisions should be used as guidelines in making current determinations; however, these past decisions should not be binding.

<sup>95</sup> See GOLDBERG ET AL., *supra* note 92, at 78. Since the implementation of the first dispute review board in the construction project example discussed by the authors, more than 100 projects were referred to the review boards, and none have led to arbitration or litigation. *See id.*

<sup>96</sup> See Ray, *supra* note 82, at 8.

<sup>97</sup> See COMMERCIAL ARBITRATION FOR THE 1990s 269 (Richard J. Medalie ed., 1991).

<sup>98</sup> See *supra* note 25 for examples of problems likely to stem from lack of funding.

<sup>99</sup> See Brock & Cormick, *supra* note 87, at 163. For a discussion of which parties are affected, see *supra* notes 16-17 and accompanying text. *See also infra* notes 128-136 and accompanying text.

procedures. Only by including such applicable issues will the grievance procedures be fair and be perceived as fair.

### B. Preventative Methods

One loophole in many resolution techniques is the lack of preventative devices.<sup>100</sup> The local grievance procedures should focus on dispute prevention and avoidance.<sup>101</sup> The model procedure states that "[d]ispute prevention is not . . . part of the grievance process."<sup>102</sup> This is the wrong approach.

Prevention is an effective part of any dispute resolution method<sup>103</sup> and the local grievance procedures must include prevention in procedures. Prevention "build[s] in consultation to head off disputes before they arise

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<sup>100</sup> See COSTANTINO & MERCHANT, *supra* note 88, at 46-47.

<sup>101</sup> The market for preventative systems is expanding. This is especially prevalent in the employment industry, which utilizes multistep grievance procedures similar to the Ryan White CARE Act procedures. See John Calhoun Wells & Wilma B. Liebman, *New Models of Negotiation, Dispute Resolution, and Joint Problem Solving*, 12 NEGOTIATION J. 119, 120 (1996). In 1947, the Federal Mediation and Conciliation Service (FMCS) was created to establish preventative dispute resolution techniques. See *id.* at 121. The number of preventative mediation cases processed by FMCS from 1983 to 1995 increased by 123%. Preventative mediation is being used in like proportion to traditional dispute mediation. "If this trend continues, one can envision a not-too-distant future in which preventative mediation will equal dispute mediation among FMCS collective bargaining services." *Id.* at 124. The City of Philadelphia has provided for prevention devices in its local grievance procedures. The City's grievance procedure states:

It is the Department's expectation that entities that have a disagreement regarding the process by which a funding decision was made will identify the situation to the Department at the earliest possible opportunity. The Department shall attempt to resolve informally disputes by providing information or statements to entities that believe the procurement process was not adhered to by the Department. Grievants are expected to cooperate with the Department in efforts to resolve the disagreement before the grievant pursues the formal grievance option.

Philadelphia Department of Public Health, *supra* note 22, at 5.

<sup>102</sup> HRSA Annotations, *supra* note 51, at 1-2.

<sup>103</sup> Indeed, preventing disputes is part of the dispute system designer's function. See GOLDBERG ET AL., *supra* note 92, at 73.

and post-dispute feedback to prevent similar disputes in the future.”<sup>104</sup> Because of the important role prevention plays in dispute resolution solutions, it is essential that the local grievance procedure effectively establish prevention methods. In order to do so, the procedures must first contain effective consultation methods before disputes arise. Second, they must allow grievants to express their feedback regarding the effectiveness of the grievance procedures.<sup>105</sup>

Many methods exist to achieve consultation. One way consultation can be obtained is by relaying information through interviews and focus groups.<sup>106</sup> It is important that the grievant be thoroughly informed as to why he or she was denied funding. By being informed of such reasons for denial when the grievant receives notification of the denial of funding, the grievant will gain a better understanding as to the rationale of the denial. The grievant must also have access to an authoritative party before the grievance procedure begins so that the grievant can talk with someone about the grievant’s concerns before filing a grievance.<sup>107</sup> This authoritative party can prevent grievances from being filed by informing a potential grievant whether they have been denied funding unfairly.

A second way the goal of consultation can be achieved is by allowing a broad base of individuals to join the design team committee so that possible future grievants will take part in the design of these grievance procedures.<sup>108</sup> It has been stated that “in the DSD model, ultimate responsibility for success appears to lie with the designer instead of the stakeholders themselves.”<sup>109</sup> By allowing the stakeholders, or in this case grievants, to take part in the design process, these grievants are solely

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<sup>104</sup> Ury et al., *supra* note 89, at 49.

<sup>105</sup> An evaluation process facilitates finding modifications that are needed in the system design. This process is an ongoing learning experience that allows for system adjustment. See COSTANTINO & MERCHANT, *supra* note 88, at 60.

<sup>106</sup> See John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist*, 12 NEGOTIATION J. 149, 154 (1996).

<sup>107</sup> See *id.* at 154–155 (explaining how access to “advisors” can encourage dispute resolutions). But see *id.* at 162 (posing some problems that may occur with the role of “advisors”).

<sup>108</sup> For information regarding the possible effects of an organization’s participation in Ryan White CARE Act community planning bodies, see generally AHSR & FHRSR, *An Examination of 20 AIDS Community Care Networks: A Network Analytic Approach* (1995) (on file with author).

<sup>109</sup> COSTANTINO & MERCHANT, *supra* note 88, at 47.

responsible for the success of the system design or, in this case, the grievance procedure. The procedures are likely to be more successful by including potential grievants in the design committee.

The local grievance procedures must ensure that persons making the model are representative of grievants. In order to ensure participation, the local grievance procedures should develop a committee separate from the peer review committee<sup>110</sup> that will be in charge of formulating the local grievance procedure.<sup>111</sup> Possible grievants are key persons in this procedure. The organizations and the key persons involved in the formulation of the procedure are partners in the design process with the responsibility for the ongoing health of the procedure.<sup>112</sup> These key persons must be required to attend all meeting sessions so that they are knowledgeable about the relevant issues. They also must take personal responsibility for their effort.<sup>113</sup> Furthermore, in order for the grievance procedure to be viable, these key persons must be able to represent their constituents realistically.<sup>114</sup>

If the grievants build the procedure, then they will use it.<sup>115</sup> Experts in the field of systems design "recommend that when one party to a relationship is considering action that will affect the other, it should . . . consult the other before taking that action."<sup>116</sup> Parties to a

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<sup>110</sup> This committee must be separate from the peer review committee to ensure objectivity so that the persons making the rules are not the ones reviewing them.

<sup>111</sup> It may even be helpful if a few members of the committee are at the federal level and serve on several local grievance committees so that issues discovered in different localities could be discussed and covered.

<sup>112</sup> See COSTANTINO & MERCHANT, *supra* note 88, at 57-58.

<sup>113</sup> See Brock & Cormick, *supra* note 87, at 145. The process of developing an effective resolution was furthered because the "key persons" took responsibility for their actions. See *id.* These "key persons" act as partners in the process. See COSTANTINO & MERCHANT, *supra* note 88, at 54.

<sup>114</sup> See Brock & Cormick, *supra* note 87, at 162.

<sup>115</sup> See *id.* at 49. "When the system's stakeholders are involved collaboratively in the design process they become true partners in identifying, understanding, and managing their disputes—and have a more vested responsibility for the successful operation of the conflict management system." *Id.* at 54.

<sup>116</sup> Stephen B. Goldberg et al., *Designing An Effective Dispute Resolution System*, in DONOVAN LEISURE NEWTON & IRVINE PRACTICE BOOK 38-47 (J. Wilkinson ed., 1991 Supp.), reprinted in GOLDBERG ET AL., *supra* note 92, at 405. These authors



dispute that are directly involved in the generation of the resolution process often have the capacity to return value to an organization through resolution of the dispute.<sup>117</sup> The best way to do this is to allow all parties that have standing to help design the grievance procedure.<sup>118</sup> Participation in the formulation of the local grievance procedure by persons having key interests in Ryan White funding should be mandated.<sup>119</sup>

By encouraging the key persons who will be affected by the system-or, in this case, grievance procedure-to be involved in the design process and the analysis of the conflict,<sup>120</sup> any bias<sup>121</sup> toward the grantees or planning council members in the procedure will be diminished<sup>122</sup> and disputes will be prevented.<sup>123</sup> Processes can be biased toward the interests of those who create them.<sup>124</sup> Therefore, to prevent biases, all interested parties must be a part of the design of the grievance procedure. As a result, many other

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define consultation as "offer[ing] an opportunity to discuss the proposed action before it takes place." *Id.*

<sup>117</sup> See Zinsser, *supra* note 106, at 163.

<sup>118</sup> People from different hierarchical levels of the organization should be involved in developing the grievance system through interviews and focus groups. Early involvement of potential grievants in the grievance procedure is crucial. "[E]arly involvement in systems design and operations is essential for DRSs to gain support at the level of national policy." *Id.* at 162. Involving grievants early in the design of the grievance procedure "reduces the number of grievances filed and helps resolve those that are filed earlier, more amicably, less expensively." *Id.* In order to involve potential grievants in the design phase, they must be notified about the creation of the grievance procedures. These potential grievants can be notified by a mass mailing to households, organizations and hospitals. Alternatively, advertisements can be placed in the locality's newspaper.

<sup>119</sup> See Brock & Cormick, *supra* note 87, at 142.

<sup>120</sup> In order for a dispute resolution system to function, both the direct and indirect interests must concur in the design and development of the system. *See id.* at 162.

<sup>121</sup> Consultation can "identify points of difference" so that the system can prepare for possible problems. *See* Goldberg et al., *supra* note 116, at 408.

<sup>122</sup> The bias concern is more applicable to the local grantee grievance procedure because of the limited scope of the people involved in making that procedure. The Ryan White CARE Act stipulates that those on the planning council represent the interests of probable future grievants.

<sup>123</sup> Consultation can prevent disputes that arise. *See* Goldberg et al., *supra* note 116, at 408.

<sup>124</sup> See John S. Murray, *Using Theory in Conflict Resolution Practice*, in *CONFLICT RESOLUTION THEORY AND PRACTICE INTEGRATION AND APPLICATION* 222, 228 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).

positive objectives are accomplished.<sup>125</sup> "The parties themselves must play an important role in the process if the benefits are to be realized."<sup>126</sup> Within each of these deliberations, the grievance procedure should stipulate that each party have the opportunity to speak their views, and that a skilled facilitator be present to accomplish open and effective communication between the parties.<sup>127</sup> There should be a requirement in the grievance procedure that these parties be jointly trained and that technical staff be members of the committee.<sup>128</sup> Technical staff can provide research data, formulate research methods and respond to administrative requests.<sup>129</sup> In all of these ways, many positive objectives will be achieved in designing a dispute resolution system.

Feedback also prevents disputes. When feedback is obtained, that feedback can be used to modify the existing resolution system so that it can resolve similar disputes that may arise in the future. It is the Senate's intent that the planning councils<sup>130</sup> and grantees<sup>131</sup> obtain feedback to ensure that the funding program is effective. Many channels can be added in order to

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<sup>125</sup> Examples of the objectives achieved are that the parties participate at a high level, good relationships are established between the parties involved in the system design and outside facilitators can build sufficient credibility to serve a neutral role. *See id.* at 228-229.

<sup>126</sup> *Id.* at 228. The parties can then consider the analysis of the conflict as their own. *See id.*

<sup>127</sup> *See id.* This joint training session need not be formal or costly. It can take place at a general meeting before any of the grievance procedure process formulation begins. The trainer can be a federal agency member responsible for developing HIV/AIDS assistance in the community who is knowledgeable about dispute resolution systems. Thus, the trainer will have technical knowledge as well as general process knowledge.

<sup>128</sup> In a case study, the issuance of technical staff facilitated the formulation of an effective dispute resolution system. *See Brock & Cormick, supra* note 87, at 146. Depending on the costs of such staff, one technical member alone can prove helpful.

<sup>129</sup> *See id.* at 146.

<sup>130</sup> The reauthorization legislation grants the planning council authority to assess program effectiveness, to delegate this function to the grantee or to perform this function with the grantee. If an entity other than the planning council performs this function, it is still the planning council's function to provide all necessary information and support for the entity to accomplish it. *See S. REP. NO. 104-25*, at 13 (1995).

<sup>131</sup> The Ryan White CARE Act Amendments also give the grantee the responsibility of ensuring program effectiveness. The grantee must make sure that the needs of people living with HIV and AIDS are satisfied. *See id.*

obtain feedback. The local grievance procedure should require that the grievant fill out an input form regarding the grievant's satisfaction level with the procedure after the grievance is resolved. In these ways, the number of future grievances will be decreased.

### C. What Parties Should Have Standing

Under the model procedure, only parties that are "directly affected" have standing to bring a grievance, and "directly affected" is defined very narrowly.<sup>132</sup> The Health Resources and Services Administration declared that "[a] balance must be struck between restricting the process too narrowly which can create tension and distrust and opening the process too widely which can overburden and delay the decision making process."<sup>133</sup> It would be a good idea, therefore, for the local grievance procedures to broaden the scope of the parties who have standing to include individuals other than those who are directly affected.<sup>134</sup> Factors that should be

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<sup>132</sup> See HRSA Annotations, *supra* note 51, at 5-6. Parties "directly affected" are service providers eligible to obtain funding under the Ryan White CARE Act, consumer groups and certain coalitions and caucuses. See *id.* at 6.

<sup>133</sup> *Id.*

<sup>134</sup> Children and families have been hit hard by the HIV epidemic and should be able to bring a grievance if they believe they have been wrongly denied funding. "As HIV spreads rapidly among intravenous drug users and their sexual partners, entire families become infected and need a full range of HIV health care and support services. As of July 1994, nearly 5000 children had received an AIDS diagnosis. AIDS will be the fifth leading cause of death for all children in this decade and a major cause of mental retardation." S. REP. NO. 104-25, at 6 (1995). Furthermore, special care must be taken to allow minority communities and minority individuals to have standing because these people have been hit especially hard by AIDS. "Although African Americans and Latinos represent 15 % of the population, they comprise 45 % of all reported AIDS cases—and 75 % of all women, children and youths with AIDS." *Id.*; cf. Philadelphia Department of Public Health, *supra* note 22, at 1 (stating that the only parties that can bring a grievance are "individual not-for-profit corporations that have met all the program guidance requirements, including page limitations, application deadlines, and other criteria determined by the department"). Specifically, the City of Philadelphia allows only the following parties to bring a grievance: (1) providers eligible to receive Title I funding; (2) consumer groups or caucuses of people living with HIV that existed prior to the procurement process; and (3) the local planning council, which is the Philadelphia eligible metropolitan area HIV Commission. See *id.* at 6. Similarly, the City of New York has given these same parties standing. See New York City Department of Health, New York Eligible Metropolitan Area, Title I Grantee

considered in determining whether a party can bring a grievance include the number of people affected by the denial or reduction<sup>135</sup> of funding, the reduction in hospital length-of-stays,<sup>136</sup> the costs incurred by the grievant,<sup>137</sup> the importance of receiving the funds and timing. Examples of these parties are hospitals, insurance companies, persons who are financially burdened by the costs of HIV/AIDS care, national AIDS organizations, individuals with AIDS, family members of individuals with AIDS and public health officials. The planning council can also bring a grievance for not obtaining necessary funds.<sup>138</sup> By providing a broad definition of parties who have standing, the local procedure will be more fair.<sup>139</sup> However, it is necessary to place a limit on which parties have standing to bring a grievance under Title I. Persons or entities who have not been financially burdened in some respect, who have already obtained the necessary funds from the government to provide services to persons affected by HIV or AIDS or who bring grievances that involve issues that have been previously decided by the grievance process in that locality should not have standing.<sup>140</sup> It should be the responsibility for the

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Grievance Procedures 2 (June 1997) (on file with author). Additionally, the City of New York Planning Council Grievance Procedures give individual persons living with HIV or AIDS standing. See New York HIV Health and Human Services Planning Council, Grievance Procedures 1 (June 1, 1997) (on file with author).

<sup>135</sup> A grievant can be an entity that has been awarded funding but is unsatisfied with the amount of the award. However, if it is determined through the local grievance procedure that the grievant is not entitled to more funding or that the grievant brought a frivolous claim, the planning council or grantee is entitled to impose sanctions, including the reduction of grant awards. See S. REP. NO. 104-125, at 19 (1995).

<sup>136</sup> See *id.* at 12 (1995).

<sup>137</sup> Child care and travel costs should be considered. See *id.* at 14.

<sup>138</sup> Telephone Interview with Jon Nelson, Chief of Division of HIV Services (Feb. 28, 1997).

<sup>139</sup> See generally *supra* note 29 and accompanying text.

<sup>140</sup> A labor-management grievance procedure that works effectively and efficiently provides that "[n]o grievance procedure shall be taken . . . if the identical issue . . . is pending before or has been decided by the State Employment Relations Board involving identical parties." Collective Bargaining Agreement Between The Ohio State University and Communications Workers of America Local 4501, *supra* note 51, 8. Even though this procedure only disqualifies identical parties from bringing a grievance relating to the same issue that has already been decided, the local grievance procedures under Title

confrontant in stage one of the grievance procedure to make an initial determination on whether that party has standing. Just as funding disputes can be brought under the grievance procedure so can disputes regarding who has standing.

#### D. *Timing*

"Rarely will timing make or break conflict resolution, but it can influence the process negatively or positively."<sup>141</sup> Timing can make the process much more difficult if it is miscalculated.<sup>142</sup> The amount of time chosen for resolving conflicts must be sufficient to allow for effective interaction and to maximize the concentration and communication skills of both parties.<sup>143</sup> Additionally, inherent in successful dispute resolution is a commitment to resolving the grievance promptly and on its merits.<sup>144</sup> If the time limits between stages, as explained above,<sup>145</sup> have not been met by the grievant, then that grievant cannot bring another grievance for that matter until another cause of action<sup>146</sup> arises. An exception should exist if the

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I can disqualify all parties on the basis of time efficiency and limitations set by the federal government for administration costs.

<sup>141</sup> DUDLEY WEEKS, *THE EIGHT ESSENTIAL STEPS TO CONFLICT RESOLUTION* 73 (1992).

<sup>142</sup> See *id.* at 76. Imposing time limits between the four stages of the grievance procedure imposes pressure on the parties to resolve the dispute informally before proceeding to costly and binding arbitration. See SANDERSON & BROWN, *supra* note 30, at 24. The effect of these time limits, in a large number of cases, is that a settlement of the grievance occurs before an arbitration hearing takes place. See *id.* Because the Ryan White CARE Act mandates binding arbitration if the grievance is not settled, if the parties cannot find a settlement, in a few days an arbitrator will impose one on them. The fear of this imposition (the fear that the arbitration award will be a determination that neither party wants) and unwillingness to pay the arbitration fee often cause the dispute to settle before the binding arbitration stage. See *id.*

<sup>143</sup> See WEEKS, *supra* note 141, at 74-75. The purpose of time limits for the original filing and subsequent processing of a grievance is to provide a systematic and prearranged method by which the grievance proceeds from one stage to another. See SANDERSON & BROWN, *supra* note 30, at 14.

<sup>144</sup> See METZGER & FERENTINO, *supra* note 47, at 23.

<sup>145</sup> See *supra* Part IV.B.

<sup>146</sup> Cause of action, in this context, refers to the next time funding under Title I of the Ryan White CARE Act is given, but that same grievant thinks he has been wrongfully denied funding.

parties mutually agree to extend any of these time limits. The local grievance procedures should provide that if the grievant misses a deadline for filing, each locality is responsible for informing that grievant, orally and in writing, that the grievant is unable to file a grievance for that action.<sup>147</sup> If the locality fails to render a decision on time or fails to meet any other deadline specified by the local grievance procedures, the local grievance procedures should specify that the locality pay a fine to the national government.<sup>148</sup> This provision will create an incentive for each locality to expedite the grievance process.

### E. Public Involvement

Public involvement in designing and implementing the local grievance procedures should be encouraged. It is important to inform the public of the existence and availability of these local grievance procedures.<sup>149</sup> When the public is informed about important programs, ideas are generated and participation is encouraged. The local grievance procedures should provide that the proceedings in any stage of the grievance process should be open to all interested parties.<sup>150</sup> Media involvement should also be considered because it addresses public perceptions and results in "broad issue-oriented coverage and editorial support for the effort."<sup>151</sup> Media involvement could result in the resolution of many policy issues as well as the discussion of

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<sup>147</sup> See SANDERSON & BROWN, *supra* note 30, at 14.

<sup>148</sup> These fines should be used in the administration of the grievance procedure regarding funding under Title I of the Ryan White CARE Act. As a result, part of the costs for administering the grievance procedure will be taken care of indirectly through these late fines.

<sup>149</sup> The method of informing the public could include printing pamphlets regarding funding decisions under Title I of the Ryan White CARE Act and distributing them to service providers, consumer groups and caucuses. Each state representative could assist in this procedure.

<sup>150</sup> These interested parties include all individuals who have standing. See *supra* note 29 and accompanying text. However, the procedures should limit the numbers to ensure that not too many people attend the proceedings. Large audiences lead to more formal proceedings and distractions. Nonetheless, ample space should exist so that all the attendants can comfortably fit into the room. Interruptions should be limited, and the room environment should be comfortable. As a result, the parties will not be distracted. See INT'L LABOUR OFFICE, *supra* note 38, at 38-40.

<sup>151</sup> WEEKS, *supra* note 141, at 74-75.

technical disputes.<sup>152</sup> However, media involvement, if required, may make this process more burdensome.<sup>153</sup> No matter what the form, the local grievance procedures should mandate methods to encourage public involvement.

#### F. *Cost Effectiveness*

Compiling, implementing and reviewing the local grievance procedures will cost money. However, resources necessary to implement these suggestions must be allocated to the grievance procedure process so that disputes will be resolved effectively. In order for the disputes to be resolved with the least amount of money and minimal third-party intervention, certain resources must be expended early on to build a greater understanding of the type of grievance procedure and processes needed.<sup>154</sup> "A more meaningful appeal process . . . may actually reduce fiscal burdens on the federal government because improper denials" cost the government more eventually.<sup>155</sup> Each of the suggestions given below is a way in which to avoid costs in the end. If an effective and efficient local grievance procedure is established, extensive resources will be conserved in the long-run. Furthermore, the establishment of an effective and efficient grievance procedure is mandated by statute. If a local grievance procedure is not effective or efficient, the Secretary has the power to deny that locality funding under the Ryan White CARE Act. Lack of funding costs much more than the limited amount of resources needed to generate a good grievance procedure initially.

It is difficult to sustain an effective and useful grievance resolution system when the system is dependent on administrative fees paid by the grievants.<sup>156</sup> Even though some of the administrative costs of the grievance

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<sup>152</sup> See *id.* at 145.

<sup>153</sup> See *id.*

<sup>154</sup> See COSTANTINO & MERCHANT, *supra* note 88, at 61. It is also important to disclose to the grievant the funding or budgetary limitation that exists so that the grievant can determine if the demand for funds is unreasonable. See ERIC GALTON, *MEDIATION: A TEXAS PRACTICE GUIDE* 123 (1993).

<sup>155</sup> *Grijalva v. Shalala*, 946 F. Supp. 747, 760 (D. Ariz. 1996).

<sup>156</sup> See David O'Connor, *The Design of Self-Supporting Dispute Resolution Programs*, 8 *NEGOTIATION J.* 85, 85 (1992). An administrative fee may be appropriate to recover reasonable costs of administering the process but should not be so burdensome as to discourage filing of legitimate grievances. See HRSA Annotations,

procedure can be paid by grantees<sup>157</sup> and HRSA,<sup>158</sup> one problem of the model grievance procedure still exists—it depends on funds from the grievants. It seems ironic and problematic that a party filing a grievance for lack of funds is responsible for paying the costs of the grievance procedure. Considering that the language of the Act itself limits the amount of money that can be used for the implementation of the grievance procedure, the possibilities seem scarce. However, solutions do exist.

The costs of these grievance procedures can be lowered in various ways.<sup>159</sup> First, volunteers can be asked to administer part of the program<sup>160</sup> or to donate money. Second, the local grantees should utilize the maximum amount of money allowable by law to administer the program. This way the grievants are assured as fair and effective a process as possible. Third, by resolving grievances before they progress to the mandatory arbitration stage, administrative costs will be greatly reduced. Fourth, the local grievance procedures can focus on prevention of disputes so that the grievance procedures will not have to be utilized as often. Including prevention as a mandatory technique in the local grievance procedures will

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*supra* note 51, at 8. Therefore, it becomes very important to keep the costs of administering the grievance process low.

<sup>157</sup> Grantees and subcontractors are able to use a certain percentage of the grant toward administrative costs; however, when these entities can restrain these costs to less than 10% of the grants awarded, they should do so. *See* H.R. CONF. REP. NO. 104-545, at 36 (1996).

<sup>158</sup> "HRSA should support planning councils in their role of assessing and addressing local administrative mechanisms that may impede rapid allocation of funds . . . ." S. REP. NO. 104-25, at 13 (1995). Furthermore, the Senate committee intended that HRSA provide an effective technical assistance network for localities to address conflict resolution and provide training to grantees, planning council co-chairs, consumers and administrative agencies. *See id.* at 16. Therefore, many of the training and resolution technique costs are to be paid by HRSA.

<sup>159</sup> These costs are generally placed in two categories. One category is the arbitrators' expenses and fees and the other category is expenses incurred in the conduct of the arbitration. These costs are generally a joint obligation of the parties unless the arbitrator awards arbitration fees to one party. *See* COMMERCIAL ARBITRATION FOR THE 1990s, *supra* note 97, at 87-88.

<sup>160</sup> It may be possible to formulate a list of qualified arbitrators who will listen to grievances and render decisions free of charge as a service to the community. Such people may include retired or serving judges, government officials, university professors and such other interested persons. *See* INT'L LABOUR OFFICE, *supra* note 38, at 20. However, no such organization has been enlisted.



reduce the procedures' costs. Prevention reduces conflicts. By providing for consultation, the underlying bases for conflict are reduced<sup>161</sup> because inequalities and value inequalities are reduced. Also, confrontation increases the level of integration among the possible adversaries. As a result, the "mutual benefits of cooperation would make the emergence of conflict very costly."<sup>162</sup> Fifth, by having the grievance procedure arranged in a low-to-high cost sequence,<sup>163</sup> the resolution of disputes will occur at the lowest cost level.<sup>164</sup> Sixth, if the people who handle grievances are trained in efficient resolution techniques, costs will be reduced.<sup>165</sup> Seventh, selecting arbitrators in advance reduces the administrative costs.<sup>166</sup> Finally, costs will be limited by allowing future localities that qualify for funding under the Ryan White CARE Act to look to other grievance procedures from similar localities as "models."<sup>167</sup> Thus, in the future, the cost of this statutory requirement that localities establish their own grievance procedures will not be as high for those localities that use other local procedures as models.

### G. Good Arbitration Techniques

The local grievance procedures should suggest that each local arbitration process be governed by the rules of the American Arbitration

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<sup>161</sup> See BEYOND CONFRONTATION 92 (John A. Vasquez et al. eds., 1995).

<sup>162</sup> *Id.*

<sup>163</sup> The model grievance procedure demands that the process proceed as follows: the filing of a grievance, nonbinding arbitration and binding arbitration. This process is arranged from low to high costs because nonbinding arbitration is typically the most expensive procedure of the three stages. See COSTANTINO & MERCHANT, *supra* note 88, at 60-61.

<sup>164</sup> See *id.*

<sup>165</sup> The costs of educating and training these individuals are greatly exceeded by the savings in time, money and emotion. See SANDERSON & BROWN, *supra* note 30, at 11.

<sup>166</sup> See HRSA Annotations, *supra* note 51, at 9.

<sup>167</sup> This has already been attempted by the Cuyahoga County, Ohio, which has adopted the City of Philadelphia's Grievance Procedures. See generally Board of Cuyahoga County Commissioners, Grievance Procedures: Title I of the Ryan White CARE Act Amendments of 1996 (June 1, 1997) (on file with author). But see Brock & Cormick, *supra* note 87, at 164.

Association.<sup>168</sup> Various organizations are available to assist localities in selecting arbitrators and mediators. The Better Business Bureau and the American Arbitration Association maintain a list of trained and impartial mediators and arbitrators, some of whom are volunteers.<sup>169</sup> University-based programs also have a panel of neutrals.<sup>170</sup> However, it seems more practical to appoint an administrative agency to select arbitrators.<sup>171</sup> Nevertheless, the arbitrator chosen must be qualified in order to participate in the locality's grievance procedure.<sup>172</sup>

Additionally, the local grievance procedures should allow the grievant to have an attorney present during arbitration. Despite the fact that attorney fees increase the costs of the process, attorney representation can be extremely beneficial.<sup>173</sup> The local grievance procedures could also provide that if the plaintiff is not represented by an attorney during arbitration, the respondent to the grievance will not be allowed to have attorney representation either.<sup>174</sup> This will increase the fairness to grievants who

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<sup>168</sup> See MARVIN HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 447 (2d ed. 1987). These rules were adopted by the National Conference of the Commissioners on Uniform State Laws. *See id.*

<sup>169</sup> See HRSA Annotations, *supra* note 51, at 10.

<sup>170</sup> *See id.*

<sup>171</sup> This is now the prevailing method for selecting an arbitrator. The agency, having an interest in pleasing both sides, discusses the matter with both sides before any list of proper panel members is formulated. For these local grievance procedures, a local agency should be chosen to select arbitrators. These arbitrators must be informed about HIV and AIDS and the funding procedure. *See* COMMERCIAL ARBITRATION FOR THE 1990s, *supra* note 97, at 30. In complex grievances, it may be important to use a tripartite panel. *See id.* at 32. The mediator and arbitrator used in the City of Philadelphia's grievance procedures are assigned by the mediation or arbitration contractor from a panel of mediators and arbitration professionals who have been preapproved by the Department. *See* Philadelphia Department of Public Health, *supra* note 22, at 10. The City also mandates that the arbitrator and mediator be different parties. *See id.* at 11.

<sup>172</sup> In order to determine if an individual is qualified to be an arbitrator, each locality should be required to follow the rules of the American Arbitration Association.

<sup>173</sup> The majority of lawyers have a negotiating style that is consistent with the collaborative approach appreciated by arbitrators. *See* THOMAS E. CROWLEY, SETTLE IT OUT OF COURT 193 (1994).

<sup>174</sup> A similar rule was used by Brown & Root, Inc., one of the largest private construction companies in the United States. *See* Zinsser, *supra* note 106, at 155.

may not be able to afford representation. On the other hand, the quality of the proceeding may not be as high. It is important that the local grievance procedures provide for reliable arbitration techniques because the arbitrator's decision is binding. It should be subject to judicial review only in limited circumstances.<sup>175</sup>

#### H. Features Similar to the Model and Specificity

The model procedure focuses on the interests involved by stating who will participate in the procedure, how the procedure will be timed and what step will occur next if the grievance is not resolved. The local procedures should adopt a similar interest-based, multistep procedure.<sup>176</sup> It is very important that a design resolution technique be specific. The model grievance procedure, on the other hand, was and could appropriately be general. However, the local grievance procedures cannot be only a description of general goals and principles because generalities lead to vagueness, inaction and lack of structure for resolving the disputes.<sup>177</sup>

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Alternatively, a fund could be generated through some procedure to pay for the grievant's attorney's fees. As a result, both parties would have attorney representation and the quality of the arbitration would be heightened.

<sup>175</sup> Because of the need to protect the integrity of the system and to expedite the granting process, only in very specific instances, such as fraud, bias or denial of natural justice, can the arbitration award be reviewed. See SANDERSON & BROWN, *supra* note 30, at 102-107. It may be beneficial to allow judicial review of an arbitration proceeding when the amount in controversy is significant. In a recent case, the amount in controversy was a factor in allowing judicial review. The court stated that an HMO is required by statute to establish a grievance procedure for Medicare enrollees who were dissatisfied because they were denied services to which they felt they were entitled, and it held that the grievants were entitled to judicial review if the amount in controversy exceeded a base amount. See *Grijalva v. Shalala*, 946 F. Supp. 747, 753 (D. Ariz. 1996). The right to review the arbitrator's decision of funding under Title I should be granted in extreme circumstances as determined by HRSA or the Secretary of Health and Human Services.

<sup>176</sup> Multistep procedures encourage the interest-based resolution of disputes. See Goldberg et al., *supra* note 116, at 408.

<sup>177</sup> In a case study involving a committee designing a resolution system for a resource allocation problem, the committee, or "task team," was unsuccessful because its report of the systems was little more than a description of general goals and principles that should have been included. See Brock & Cormick, *supra* note 87, at 143.

Even though "prevention is not part of the grievance procedure,"<sup>178</sup> the Department of Health and Safety recommends that staff be trained during the decision-making process.<sup>179</sup> The local grievance procedures should mandate that all involved parties, including staff, be trained and educated at all phases of the grievance procedure. One of the most important resolution techniques is basic education and skills training for staff members in effective negotiation and leadership roles.<sup>180</sup>

## VI. CONCLUSION

It is understandable that the federal government forces local agencies to develop their own grievance procedures. However, the model grievance procedure established by the Secretary has requirements for the local procedures that are too broadly defined. In order for the local grievance procedures to facilitate the expedition of funds and allow directly affected parties to obtain relief, the local grievance procedures must be more specific than the model procedure and must mandate certain characteristics. The local grievance procedures, by defining and achieving the goals of the grievance procedure, preventing disputes from occurring, being cost effective and utilizing good arbitration techniques, will be effective methods of providing services to parties affected by the funding decisions of the planning council and grantees.

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<sup>178</sup> HRSA Annotations, *supra* note 51, at 1-2.

<sup>179</sup> *See id.* at 4.

<sup>180</sup> *See* Wells & Liebman, *supra* note 101, at 125. This training can invite more effective communication and more innovative techniques. *See id.*